Supreme Court, U.S.
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No. 93-1441

In The

Supreme Court of the United States

October Term, 1994

RICHARD M. WALSH,

Petitioner,

v.

STATE OF DELAWARE, MICHAEL N. CASTLE, and THE DEPARTMENT OF MILITARY AFFAIRS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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July 8, 1994

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QUESTION PRESENTED

Is a retired state National Guard officer entitled to have access to a federal district court in order to overturn a decision denying him promotion made ten years earlier?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully ask this Court to deny this petition for certiorari seeking review of an unreported judgment order of the United States Court of Appeals for the Third Circuit dated November 19, 1993.

COUNTER-STATEMENT OF THE CASE

1. From 1948 until 1982, Richard Walsh served as a citizen-soldier in the Delaware National Guard. Compl. ¶ 2. During most of his tenure, he wore the "two" hats

typical of a state guardsman: a member of the state militia as well as a "federally recognized" member of the reserve component of the United States Armed Forces, the National Guard of the United States. *See generally Perpich v. Department of Defense*, 496 U.S. 334, 345-49 (1990).[1]

2. The year 1982 was a watershed year for Walsh's military career; by then, he had served for more than 20 years and had held the rank of Colonel for almost a half-decade. But that year, he had to be promoted to Brigadier General. If he did not move up, then, under one of the myriad of statutes that Congress has enacted to prevent the armed forces from becoming top heavy with entrenched officers, he would face mandatory assignment to the federal "retired reserve." *See* 10 U.S.C. § 3851(a) (1988). That change would have ended his dual national guard service. At the time, a Brigadier General slot was open in the Delaware guard: that of Deputy Commanding General of the 261st Signal Command. Although Walsh was considered for the command by the convened promotion selection board, the Adjutant General of Delaware eventually decided to select another person for the "federally recognized" Deputy Commander position. Compl. ¶¶ 12-14, 33. On April 29, 1982, Walsh had been informed that he was no longer in the running for the position. Compl. ¶ 26.

3. Walsh saw the selection of the other person – later determined to be medically unsuited – as an act of

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[1] For his three decades of valued service, petitioner deserves, and has, his State's gratitude and respect.

political cronyism, achieved only because false statements had been inserted into his Officer Efficiency Report and a biased promotion selection board had been empaneled. Compl. ¶¶ 17-29. *See* Pet. for Cert. at 6-7. Walsh spent the remainder of 1982 seeking to have the Governor of Delaware and the Secretary of the Army intervene to give him the commission and to generally investigate the Delaware National Guard. Neither official found reason to grant the relief Walsh requested. In the meantime, in August 1982, Walsh was transferred to the "retired reserve." Compl. ¶ 38.

4. In May 1983, Walsh asked the United States Department of the Army's Board for Correction of Military Records (ABCMR) to exercise its review powers to look into his failure to be promoted to the Deputy Commander position. Compl. ¶ 56. *See* 10 U.S.C. § 1552(a) (1988). On October 12, 1983, the ABCMR, without holding a formal hearing, denied his application. Walsh's Rsp. in Opp. to Defs.' Motion to Dismiss, Exh. J ("App. F"). *See* 32 C.F.R. § 581.3(c)(5)(ii), (iv) (1993). Walsh persisted. Twice more in the following years, the ABCMR denied his requests to revisit the events, each time finding that the information and arguments he had submitted did not warrant any alteration of the original decision. App. F. *See* 32 C.F.R. § 581.3(c)(5)(iii), (iv) (1993). So, too, the staff of the ABCMR rejected additional requests for reconsideration submitted by Walsh. App. F. *See* 32 C.F.R. § 581.3(c)(5)(iii) (1993).

5. As Walsh, over the years, continued to press his complaints to state and federal elected officials, a new Adjutant General had been appointed. In 1989, the new Adjutant undertook an inquiry into whether the retired

Walsh, then 59 years old, could be reinstated as an active general officer. However, the Adjutant learned that, in light of Walsh's age and because of the intervening period of retired status, governing congressional enactments and federal Army regulations precluded Walsh from obtaining the necessary promotions to a Brigadier and then possibly Major General. Because Brigadiers must retire at age 60 and because a year of active service must precede a promotion to that rank, there was simply not enough time for Walsh to accrue the needed year of preceding active service before he reached the mandatory retirement age. *See* 10 U.S.C. §§ 3364(e), 3843(b) (1988). On May 23, 1989, the new Adjutant General informed Walsh of the impossibility of him returning to active service. Compl. ¶¶ 91, 98. *See* Pet. for Cert. at 9.

6. In November 1989, Walsh filed a complaint with the Equal Employment Opportunity Commission. He charged that the Adjutant's conclusion – that Walsh, at age 59, could not be reactivated and promoted – constituted a violation of the Age Discrimination Employment Act, 29 U.S.C. §§ 621-34 (1988). Two months later, the EEOC notified Walsh that it would not proceed further because the ADEA does not apply to uniformed members of the armed services. Compl. ¶ 100.

7. Walsh then again sought help from his Congressional delegation. An inquiry from Senator Joseph Biden engendered a response from the ABCMR, delivered in October or November 1990. That correspondence summarized both the Board's denial, seven years before, of Walsh's initial application to it and the ensuing rejections of several requests for reconsideration. It suggested that the Senator should emphasize to Walsh that "he has

exhausted his opportunity for relief with the Army's administrative appeals system," so that "[h]is only recourse now is in a federal court of competent jurisdiction." Compl. ¶ 102; Walsh's Rsp. in Opp. to Defs.' Motion to Dismiss, Exh. J (App. F).

8. Eighteen months passed. Then on May 22, 1992, Walsh filed a complaint in the United States District Court for the District of Delaware. Invoking 42 U.S.C. §§ 1983, 1985, and 1986, Walsh alleged in five causes of action that the denial of the promotion in 1982 and the later continuous refusal to reinstate him violated constitutional due process as well as applicable army and Delaware National Guard regulations. Compl. ¶¶ 1-5; Pet. App. C-5 to C-6. In a sixth cause, Walsh claimed that the Guard's inability to "reactivate" and promote him in 1989 (because his age prevented him from being able to accrue the necessary pre-promotion time) constituted age discrimination actionable under the ADEA. Compl. ¶ 6; Pet. App. C-7. Named as defendants were Michael N. Castle, who was then Governor, the Military Department of Delaware, and the State itself. Because, by then, Walsh had reached the age of 62, he did not request reinstatement. Instead he asked for lost back pay in the amount of $130,000 and lost future retirement benefits in the amount of $175,000. Compl. at 50-51.

9. All the defendants moved to dismiss, arguing that they all enjoyed Eleventh Amendment immunity and that Walsh's entry into federal court had come much too late. The district court accepted the latter defense. It ruled that counts one through five (the civil rights claims) were governed by the borrowed Delaware statute requiring personal injury actions to be commenced within two

years after the injury. Applying that statute, the court held that because more than two years had intervened between the filing of the action and both Walsh's 1982 retirement and the 1989 notification that Walsh would not be reinstated, all the civil rights causes were time-barred. Pet. App. at C-5 to C-7. Turning to the age discrimination claim, the court, applying the then-current time limits in the ADEA, held this cause had also been filed beyond the limitation period. Walsh had not commenced his action within ninety days after being turned down by the EEOC in 1990. Pet. App. C-7 to C-8. *See* 29 U.S.C. § 626(e) (Supp. IV 1992). Walsh moved for reconsideration, arguing that the court should have used the two- and three-year limitation periods incorporated into the ADEA prior to its amendment in 1991. *See* 29 U.S.C. § 626(e)(1) (1988) (incorporating 29 U.S.C. § 255(a)) (Pet. Cert. at 3-4). He further claimed that the time for filing his civil rights claims had been tolled while he had been seeking administrative review before the ABCMR. The district court accepted Walsh's contention that the pre-1991 limitation periods should apply to his ADEA claim, but it held that his action was still not timely under these older constraints. Pet. App. B-8 to B-9. Turning to Walsh's tolling argument, the court ruled that, because exhaustion of administrative remedies is generally not required prior to instituting a civil rights action in federal court, Walsh had failed to establish "that the National Guard's appeals system impacted in any way Plaintiff's time for filing his civil rights complaint in federal court." Pet. App. B-7 to B-8. It thus reaffirmed its dismissal of the entire complaint.

10. On appeal, the court of appeals affirmed by judgment order, Pet. App. D-1 to D-2, and thereafter rebuffed Walsh's later requests for panel or *en banc* rehearing. Pet. App. A-1 to A-2. Walsh then filed a timely petition asking this Court for review.

REASON FOR DENYING THE PETITION

BECAUSE IT IS NOT CLEAR THAT PETITIONER WOULD BENEFIT FROM THE RULE HE SEEKS, THERE IS NO REASON TO GRANT REVIEW.

1. The Civil Rights Claims

In five causes in his 1992 suit, Walsh claimed that his failure to be promoted in 1982 had come about in a way which violated constitutional due process as well as governing military regulations. Such violations, he claimed, not only had prevented him from becoming a Brigadier General but had doomed him to reassignment to the retired reserve that same year. In the court of appeals, these causes, premised on the several civil rights statutes, were, under well-settled precedents, pre-ordained to dismissal as time-barred. Under the "borrowed" Delaware personal injury statute of limitation, Walsh had two years after the injury to file his action. Del. C. Ann. tit. 10, § 8119 (1975). Generally, the clock would have begun to run in April 1982, when Walsh was informed he was no longer being considered for the general officer slot and thus would face mandatory transfer to the retired reserve within months. *See Chardon v. Fernandez*, 454 U.S. 6, 6-8 (1981) (*per curiam*). Delaware law also would not postpone the limitations period or suspend the clock while

Walsh pursued related relief. *Marker v. Talley*, 502 A.2d 972, 977 (Del. Super. 1985). *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-92 (1980). The Court of Appeals for the Third Circuit has also decided that a state national guardsman, like Walsh, challenging a promotion decision, may ask a federal court to grant injunctive relief such as reinstatement (and presumably back pay) without first seeking administrative relief before the appropriate service's review board. *See Jorden v. National Guard Bureau*, 799 F.2d 99, 102 n. 5 (3rd Cir. 1986), *cert. denied*, 484 U.S. 815 (1987). Thus, without the need to exhaust those intra-service remedies, there would be no compelling federal interest which would require reformulating the applicable state limitation period to take into account any time which the military review process might consume. *Accord Wright v. United States*, 19 Ct. Cl. 779, 783-85 (1990) (because resort to military review board is "permissive," six-year limitation period under 28 U.S.C. § 2401 is neither delayed nor tolled for such review process); *Hurick v. Lehman*, 782 F.2d 984, 987 (Fed. Cir. 1986) (same). Accordingly, Walsh's 1992 action, filed ten years after the promotion decision, came eight years too late.

By his petition, Walsh asks this Court to create a federal rule to change the limitation periods for judicial actions filed by "federally recognized" national guard personnel seeking to challenge enlistment, demotion, and promotion decisions made at the local state level. He proposes that the time period for instituting suit involving those situations should not begin to run until a military review board has rendered its decision, or, as an alternative, that the applicable limitation period should be tolled while the matter is pending before such board.

To support his rule, Walsh looks to language in opinions by other courts of appeals that suggest that before "federally recognized" guardsmen can ask the federal court to consider intervening in military personnel decisions, they must have presented their complaints about promotions and demotions to the military services' review boards, such as the ABCMR. *See, e.g., Williams v. Wilson*, 762 F.2d 357, 359-60 (4th Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55, 57 (1st Cir. 1984), *overruled in main in Wright v. Park*, 5 F.3d 586, 590-91 (1st Cir. 1993). In so doing, those courts have recognized that a federal review board cannot order direct relief (such as reinstatement or promotion) within the state national guard component. But they have surmised that the administrative route may provide balm within the realm of the guardsman's status as a "federally recognized" officer. Thus, if the review board would "overrule" the local decision, the guardsman might be able to walk his "corrected" federal status into a position in a guard unit in another state or into a federal ready reserve unit. *Penagaricano*, 747 F.2d at 57. A decision by a federal board that the local decision violated applicable federal military rules may also exert pressure on the state commanders to rethink their decision. *Navas v. Gonzalez Vales*, 752 F.2d 765, 770 (1st Cir. 1985); *Sanders v. McCrady*, 537 F.2d 1199, 1200 n. 3 (4th Cir. 1976). In both scenarios, there might not be any need for any eventual federal judicial involvement. Walsh posits that if such an exhaustion requirement serves important goals, then the limitations periods for bringing court actions challenging such

military decisions should be restructured to take cognizance of the time spent before such boards.[2]

A rule which requires a "federally recognized" state guardsman to seek relief before a military review board before filing suit over a personnel decision may be a good one. A better rule might be that an appeal to such a review board is the only forum for relief, with judicial intervention being limited to ensuring that the board's decision was neither arbitrary nor capricious. *See Chappell v. Wallace*, 462 U.S. 296, 302-04 (1983); *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008-11 (8th Cir. 1989). *Cf. Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 770-71 (7th Cir. 1993). But this matter is not the vehicle for this Court to examine the interrelated and tangled questions of exhaustion, the scope of judicial deference to military decisionmaking, and the calculation of the length of any applicable limitations period. The civil rights claims asserted by Walsh would not survive even under any variation of the rule he proposes. To make his civil rights causes timely under the borrowed two-year statute of limitations, Walsh dates the end of ABCMR review as mid-November 1990, Pet. for Cert. at 10-11, 19, relying on a letter Senator Biden received from the ABCMR. That 1990 correspondence summarized the Board's *past* decisions on Walsh's initial appeal and his later requests for reconsideration. It reported that Walsh's initial request for review was denied in 1983 and that his later applications to reopen were also rejected over the ensuing years.

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[2] Of course, the same courts, after requiring exhaustion, have in most instances found the underlying military dispute non-amenable to federal court scrutiny.

Walsh's Rsp. in Opp. to Defs.' Motion to Dismiss, Exh. J (App. F). Initially, that explanatory letter could hardly be viewed as the formal "final judgment" by the administrative board, with all the mentioned prior decisions being merely interlocutory rulings. By regulation, the ABCMR had to notify Walsh of its earlier denials, noting the grounds for the decision. 32 C.F.R. § 581.3(c)(5)(iv)-(vi) (1993). Those notices, not a letter to a Senator, should count as the trigger for any permitted follow-up federal court action. Secondly, a rule keying the limitations period to exhaustion cannot be expanded into one where each later request for reconsideration can be used to start a brand new limitation period for filing suit to challenge (via a full-blown court proceeding) the original hiring, firing, or promotion decision. Such an expansion would render any limitation period meaningless.

Of course, if, as indicated in the ABCMR's 1990 letter to Senator Biden, the ABCMR had duly and repeatedly rejected Walsh's claim years earlier, then the clock on the limitation period had begun to run many years before 1992. If so, even if Walsh would have been entitled to a new full two-year period at the end of the ABCMR review to file suit, his 1992 action still came several years late. As the proponent of suspension or tolling, Walsh had the obligation to establish as a matter of law (either federal or state) that he had not slept on his rights. The facts he has presented simply do not leave a clear enough picture to determine whether, even under his theory of tolling during the administrative review, his lawsuit was timely.

2. The ADEA Claim

In his May 1992 suit, Walsh also complained that the new Adjutant General had violated the ADEA when he announced to Walsh, on May 23, 1989, that the Delaware Guard could not then reactivate Walsh because Walsh's age did not allow enough time for the required year of active service needed before he could be elevated to an active Brigadier General rank. Compl. ¶¶ 91-94. To make his ADEA claim timely, Walsh, here and below, relied on the three-year filing window for "willful" violations as incorporated into the ADEA prior to its amendment in 1991. 29 U.S.C. § 626(e)(1) (1988) (incorporating 29 U.S.C. § 255(a) (1988)) (Pet. for Cert. at 3-4). However, at the same time, Walsh does not claim that the ADEA vitiated the profusion of "up or out" statutes Congress has enacted to govern the length of service at the various ranks in the military service. Indeed, he concedes that, in the best scenario, he could have been forced to leave active service in the National Guard when he reached the age of 62. Nor has he ever suggested that the new Adjutant General incorrectly interpreted the Congressional enactments and federal regulations when the Guard determined, in 1989, that Walsh could not be "reinstated" to active service. Instead, Walsh's claim is that, because he was improperly terminated in 1982, the Guard's failure, in 1989, to "waive" the statutory and regulatory service and age restrictions constituted a violation of ADEA. Yet, with such a theory, it is hard to brand the 1989 refusal as a "willful" violation of the ADEA, triggering the three-year, rather than the ordinary two-year, limitations period. Compliance with Congressional enactments and unchallenged army regulations hardly

bespeaks the type of intentional or callous behavior which would be needed to trigger the extended limitation period. *See McLaughlin v. Richmond Shoe Co.*, 486 U.S. 128, 133 (1988). Without the three-year window, Walsh's suit, filed beyond the ordinary two-year period, was untimely.

Moreover, Walsh's limitation argument is hardly one of importance. His claim that he should have access to a federal court relies on a limitation period which was altered before he filed suit. Finally, most courts have held that Congress did not intend that the ADEA reach to persons serving in the uniformed federal armed forces or in the state militias. *Frey v. State of California*, 982 F.2d 399, 402-04 (9th Cir. 1991); *Kawitt v. United States*, 842 F.2d 951, 953-54 (7th Cir. 1988); *Helm v. State of California*, 722 F.2d 507, 509 (9th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX F

Walsh v. Castle, et. al., C.A. 92-298 (D. Del.), Plaintiff's Response in Opp. to Defendant's Motion to Dismiss, Exh. J. (Oct. 15, 1992)

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
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SFMR-RBR
WALSH, RICHARD M.
226-16-6699

Honorable Joseph R. Biden, Jr.
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

This is in response to your letter of 26 September 1990 to the Honorable Richard L. Armitage, former Defense Assistant Secretary (International Security Affairs) concerning Mr. Richard M. Walsh's efforts to have his military records corrected. Your letter was referred here as a matter more properly for consideration by the Department of the Army, and more specifically by this Board.

Mr. Walsh's original application to this Board was denied without a formal hearing pursuant to the Board's governing regulation on 12 October 1983. He had asked, essentially, that his records be corrected by deleting allegedly unjust entries in an officer efficiency report, and by reinstating him in the Army National Guard. Subsequent requests for reconsideration were considered and

denied by the Board on at least two occasions in the intervening years. On each of those occasions he was informed that the new information and new contentions submitted did not warrant a reversal of the Board's original decision. Other requests for reconsideration were determined not to amount to new evidence, and were denied by the staff of the Board during the same period, in accordance with the governing regulation.

He indicated in his letter to you of 18 September 1990 that he had included "conclusive and irrefutable facts in the two enclosed affidavits," which, I presume, he feels supports a reversal of the Board's denial of his application. I have reviewed those enclosures and conclude that they are nothing more than his own notarized statements embellishing his original contentions. While he also has apparently obtained certain information from the Department under the Freedom of Information Act, which allegedly substantiates some kind of a "coverup" within the Department, I found nothing in his letter to you or in the enclosures which would warrant resubmitting his case to the Board.

Mr. Walsh should be advised that he has exhausted his opportunity for relief within the Army's administrative appeals system. His only recourse now is in a federal court of competent jurisdiction.

I hope this information has been helpful and I am sorry my response could not be favorable.

Sincerely,

(signed) David R. Kinneer

David R. Kinneer
Executive Secretary